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PP v. ABDUL REHMAN ABDUL HAMEED

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
VARGHESE GEORGE JCA
AB KARIM AB JALIL JCA
B [CRIMINAL APPEAL NO: B-05(LB)-245-09-2015 (PAK)]
25 OCTOBER 2016

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal and discharge – Appeal by prosecution – Accused charged for murder – Prosecution's case wholly-*
C *based on circumstantial evidence – Accused acquitted and discharged at close of trial – Whether circumstantial evidence sufficient to prove accused's guilt – Whether defence raised reasonable doubt on prosecution's case – Penal Code, s. 302*

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Prosecution's case*
D *wholly-based on circumstantial evidence – Whether circumstantial evidence sufficient to prove accused's guilt – Whether defence raised reasonable doubt on prosecution's case*

EVIDENCE: *Circumstantial evidence – Murder – Penal Code, s. 302 – Prosecution's case wholly-based on circumstantial evidence – Accused's DNA found*
E *on deceased's cloths and fingernails and other items – Whether circumstantial evidence sufficient to prove accused's guilt*

The respondent and his wife ('the deceased') were renting a room ('the room'). One morning, the tenant ('SP9') of another room in the same house saw the respondent leaving the room. The respondent did not return
F since and the room remained locked for about two days. On the request of the landlady, SP9 broke into the room and found the body of the deceased. A post-mortem carried out revealed that her death was caused by stab injuries to the chest which penetrated through her heart. The respondent's DNA was found on the deceased's cloths and fingernails and a torn photograph. The
G respondent was arrested and the police was led to a hotel where he was staying. He had checked into the hotel under a different identity, using an identification card bearing another name and not by using his own passport. A sum of RM7,000 was recovered at the hotel. According to the respondent, the sum were proceeds of the sale of some jewellery belonging to his
H girlfriend. The respondent was charged at the High Court for murder, an offence under s. 302 of the Penal Code. The prosecution's case was wholly-premised on circumstantial evidence. Satisfied that the prosecution had established a *prima facie* case, the respondent was called to enter his defence. The respondent submitted that (i) the last time he saw his wife was on the morning he left the house; (ii) he stayed at the hotel because he worked late
I and his workplace was close to the hotel; (iii) he did not use his passport at the hotel because he did not have a valid visa/work permit; (iv) the jewellery belonged to him although he had asked permission from his wife to dispose

it of to raise cash; and (v) the blood stains found might have been from a cut to his hands. The trial judge held that the entire circumstantial evidence was insufficient to prove the respondent's guilt. The respondent was acquitted and discharged. Hence, the present appeal by the prosecution on the grounds that there was a lack of judicial appreciation by the trial judge of the totality of the evidence at the close of the trial.

Held (allowing appeal)
Per Varghese George JCA delivering the judgment of the court:

(1) The trial judge failed to fully address and weigh the totality of evidence at the close of the trial. The prosecution had more than sufficiently established the respondent's motive in causing the death of the deceased. There was no reasonable doubt raised by the defence to the prosecution's case. Therefore, the trial judge was wrong in acquitting and discharging the respondent. The acquittal and discharge of the respondent was set aside and substituted with a conviction under s. 302 of the Penal Code. The respondent was sentenced to death. (paras 6, 22, 46 & 47)

(2) The trial judge failed to appreciate the fact that instead of returning to the room, the respondent checked in a hotel. The respondent tried to justify his stay at the hotel on the ground that he worked late and his workplace was close to the hotel and even attempted to camouflage or fake his real identity until his arrest. The respondent's intention to assume a different identity and deceive was significant to have been considered. This subsequent conduct was intended to throw the police of his scent, when the deceased's body was eventually found and there would be a search for him. This attempt by the respondent appeared to have been lost on the trial judge. (paras 23, 26 & 27)

(3) There was a major shift in the respondent's version as to the ownership of the jewellery in the defence. At the pawnshop, the respondent said that the jewellery belonged to his girlfriend. However, in his defence, the respondent asserted that the jewellery belonged to the deceased or in the least, it was in her possession and he had sought permission from her to sell the same to raise cash. It was an afterthought. The use of the girlfriend excuse at the pawnshop was an attempt to divert any attention from the deceased. It was highly indicative of the respondent's culpability to the offence charged. (paras 30, 31, 33 & 37)

(4) The trial judge failed to give sufficient consideration to the evidence that the respondent's DNA was detected on the clothing worn by the deceased, her fingernails and other articles from the room where the deceased was found. This was the most relevant and crucial evidence that linked the respondent to the offence. The respondent's attempt to exonerate himself by claiming that the source of the blood stains on the

deceased's clothing was from a cut due to a broken glass and not arising from him being at the scene and being involved in inflicting violent injuries suffered by the deceased, was an afterthought. (paras 38 & 40)

Bahasa Malaysia *Headnotes*

Responden dan isterinya ('si mati') menyewa sebuah bilik ('bilik'). Satu pagi, penyewa ('SP9') bilik lain di dalam rumah yang sama ternampak responden keluar dari biliknya. Responden tidak pulang sejak itu dan biliknya terkunci selama kira-kira dua hari. Atas permintaan tuan rumah, SP9 memecah masuk bilik responden dan menemui mayat si mati. Bedah siasat mayat si mati mendedahkan bahawa kematiannya diakibatkan oleh luka tikaman pada dada yang menembusi jantungnya. DNA responden dijumpai pada pakaian dan kuku si mati dan pada sekeping gambar yang terkoyak. Responden ditahan oleh pihak polis dan dibawa ke sebuah hotel di mana dia menginap. Dia telah mendaftar masuk hotel tersebut dengan identiti berbeza, menggunakan kad pengenalan lain dan tidak menggunakan pasportnya. Wang sebanyak RM7,000 juga dijumpai di hotel tersebut. Menurut responden, jumlah tersebut adalah hasil gadaian beberapa barang kemas milik teman wanitanya. Responden dipertuduh di Mahkamah Tinggi kerana membunuh, satu kesalahan di bawah s. 302 Kanun Keseksaan. Kes pihak pendakwaan berasaskan keterangan ikut keadaan semata-mata. Berpuas hati pihak pendakwaan telah membuktikan kes *prima facie*, responden dipanggil membela diri. Responden menghujahkan bahawa (i) kali terakhir dia melihat isterinya adalah pada pagi dia meninggalkan rumah; (ii) dia menginap di hotel kerana pulang lewat dari kerja dan tempat kerjanya berdekatan dengan hotel tersebut; (iii) dia tidak menggunakan pasportnya di hotel kerana dia tidak mempunyai visa/permit kerja sah; (iv) barang kemas tersebut miliknya dan dia telah meminta kebenaran isterinya untuk menggadaikannya bagi mendapatkan wang; dan (v) kesan darah yang dijumpai mungkin akibat luka pada tangannya. Hakim bicara memutuskan bahawa keseluruhan keterangan ikut keadaan tidak cukup untuk membuktikan kebersalahan responden. Responden dilepaskan dan dibebaskan. Oleh itu, timbul rayuan ini oleh pihak pendakwaan atas alasan tiada pertimbangan kehakiman secukupnya oleh hakim bicara terhadap keseluruhan keterangan di akhir perbicaraan.

Diputuskan (membenarkan rayuan)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara gagal mempertimbang dan menilai keseluruhan keterangan di akhir perbicaraan. Pihak pendakwaan telah, lebih daripada cukup, berjaya membuktikan motif responden menyebabkan kematian si mati. Tiada keraguan munasabah yang dibangkitkan dalam pembelaan terhadap kes pihak pendakwaan. Oleh itu, hakim bicara terkhilaf dalam melepaskan dan membebaskan tertuduh. Pelepasan dan pembebasan responden diketepikan dan diganti dengan sabitan bawah s. 302 Kanun Keseksaan. Responden dijatuhkan hukuman mati.

(2) Hakim bicara gagal mempertimbangkan fakta responden daftar masuk di hotel dan tidak pulang ke bilik sewanya. Responden cuba menjelaskan bahawa dia menginap di hotel kerana pulang lewat dan tempat kerjanya berdekatan dengan hotel malah cuba menyamar atau menggunakan identiti lain hingga dia tertangkap. Niat responden menggunakan identiti lain dan menipu penting dipertimbangkan. Tindakan terkemudian ini berniat mengalih perhatian pihak polis apabila mayat si mati dijumpai dan dia akan dicari. Kepentingan percubaan ini jelas tidak dipertimbangkan oleh hakim bicara.

(3) Terdapat perubahan besar dalam versi responden tentang milikan barang kemas dalam pembelaan. Di kedai pajakan, responden menyatakan bahawa barang kemas tersebut milik teman wanitanya. Walau bagaimanapun, dalam pembelaannya, responden menyatakan bahawa barang kemas tersebut milik si mati atau barang kemas tersebut dalam jagaan si mati dan dia telah meminta kebenaran isterinya untuk menjual barang kemas tersebut bagi mengumpul wang. Ini satu fikiran semula. Menggunakan alasan teman wanita di kedai pajakan adalah satu langkah mengalih perhatian daripada si mati. Ini menunjukkan kebersalahan responden terhadap kesalahan yang dipertuduh.

(4) Hakim bicara gagal mempertimbangkan secukupnya keterangan bahawa DNA responden ditemui pada pakaian dan kuku si mati dan barang-barang lain di dalam bilik di mana si mati dijumpai. Keterangan ini amat relevan dan penting dan mengaitkan responden dengan kesalahan. Percubaan responden untuk melepaskan dirinya dengan mendakwa bahawa kesan darah pada pakaian si mati diakibatkan oleh luka terkena kaca pecah dan bukannya kerana dia berada di tempat kejadian dan menyakiti si mati hingga cedera parah, adalah satu fikiran semula.

Case(s) referred to:
Chan Chwen Kong v. PP [1962] 1 LNS 22 CA ***(refd)***
Chandrasekaran & Ors v. PP [1970] 1 LNS 11 HC ***(refd)***
Chang Kim Siong v. PP [1967] 1 LNS 18 FC ***(refd)***
Jayaraman Velayuthan & Ors v. PP [1982] CLJ 464; [1982[CLJ (Rep) 130 FC ***(refd)***
Karam Singh v. PP [1967] 1 LNS 65 FC ***(refd)***
Mohd Azam Raja Abdullah v. PP [2015] 1 CLJ 1080 CA ***(refd)***
PP v. Haniff Basree Abdul Rahim [2004] 3 CLJ 700 HC ***(refd)***
PP v. Magendran Mohan [2005] 3 CLJ 592 HC ***(refd)***
Sunny Ang v. PP [1965] 1 LNS 171 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Penal Code, s. 302

For the appellant - Wong Poi Yoke; DPP
For the respondent - Chong Yin Xin; M/s Thong Seng Kong & Assocs

[Editor's note: For the High Court judgment, please see PP v. Abdul Rehman Abdul Hameed [2014] 1 LNS 1091 (overruled).]

Reported by Najib Tamby

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JUDGMENT

Varghese George JCA:

Introduction

[1] The respondent had been charged for murder at the High Court in Shah B Alam. The charge proffered against him read:

> Bahawa kamu di antara 8 Ogos 2012 jam lebih kurang 11.00 malam hingga 9 Ogos 2012 jam lebih kurang 7.00 pagi, beralamat di No. 14A, Jalan PJU 1/2, Kg. Chempaka, 47301 Petaling Jaya di dalam daerah Petaling di dalam Negeri Selangor Darul Ehsan dengan sengaja menyebabkan C kematian kepada Rikajanti (No. Pasport: A1469378). Oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] The respondent denied the charge. At the close of the prosecution case, the learned trial judge found that there was insufficient evidence to D establish a *prima facie* case against the respondent and proceeded to acquit and discharge the respondent.

[3] The Public Prosecutor appealed against that decision. The Court of Appeal on 15 June 2015 allowed the appeal and directed the respondent to enter his defence to the charge. The case was accordingly remitted to be E heard further before the same trial judge.

[4] The respondent elected to give evidence under oath. No other witness except the respondent was called for the defence.

[5] On 8 September 2015, the learned trial judge held that more than a F reasonable doubt had been raised by the respondent's defence and accordingly the respondent was once again acquitted and discharged of the charge brought against him.

[6] The Public Prosecutor appealed that decision of the High Court given at the end of the trial. This was the appeal before us. Having perused the G record and considered the submissions of the respective counsel, we unanimously allowed the Public Prosecutor's appeal. The acquittal and discharge of the respondent was set aside and substituted with a conviction under s. 302 of the Penal Code. The respondent was sentenced to death by hanging.

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Principles Applicable

[7] The Court of Appeal in *Mohd Azam Raja Abdullah v. PP* [2015] 1 CLJ 1080 had in a similar context instructively observed as follows:

> [4] By allowing the prosecution's appeal and ordering for the defence to I be called, it is implicit that the Court of Appeal has found as a matter of law that a *prima facie* case for murder had been established against the appellant. Thus the only issue for the learned trial judge to consider was whether the appellant's explanation if any had cast a reasonable doubt in the prosecution's case as to his guilt.

[8] It was also apposite to remind ourselves of the provisions of s. 182A (procedure at the conclusion of the trial) of the Criminal Procedure Code, which was in the following terms:

182A.

(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

Prosecution Case - Recalled

[9] The prosecution case was wholly premised on 'circumstantial evidence' to implicate the respondent in the murder of the deceased as per the charge. There was no direct eyewitness produced to establish that the injuries which caused the death of the deceased was inflicted by the respondent. There was also no weapon recovered by the police. Nevertheless, the learned trial judge acknowledged (at the close of prosecution case) that in law circumstantial evidence was sufficient for the court to convict the accused of a criminal charge if the cumulative effect of all evidence that was before the court led to an irresistible conclusion or did point irresistibly to the guilt of the accused.

[10] The principal aspects of circumstantial evidence led and relied on by the prosecution in this case could be summarised as follows:

(a) The deceased and respondent were husband and wife (or at least, in some such relationship) and were staying together in the rented room from where the body of the deceased was recovered.

(b) The respondent was seen leaving the room with a bag on the morning of 9 August 2012 by SP9 (Mohd Zambri bin Hussain), the tenant of another room in that same house.

(c) The room occupied by the deceased and the respondent had remained locked for about two days. On the request of the landlady, SP9 broke into the room on 10 August 2012 and found the body of the deceased covered by a blanket.

(d) There were no signs of any break-in into the room.

(e) The deceased's hands and feet were found tied with separate scarves. The autopsy report revealed stab injuries to the chest of the deceased which had penetrated through the deceased heart; this was attributed to

A be the cause of the death although the other injuries on the deceased's body indicated that the deceased had put up a struggle. The estimated time of death according to the pathologist SP6 (Dr Amir Saad bin Abdul Rahim) was between two to three days prior to the recovery of the body on 10 August 2012.

B (f) Forensic tests carried out showed that the respondent's DNA was found on blood samples lifted from items of clothing worn by the deceased and from the fingernails of the deceased too. The respondent's blood was also detected on a torn photograph found in the room and on a TV rack in the room that was occupied by the deceased and the respondent.

C (g) The respondent had not returned to the room after 9 August 2012. After his arrest on 13 August 2012, the respondent had led the police to a hotel in Bangi where he had been staying. He had checked into that hotel under a different identity using a UNHCR identification card bearing another name (Shakar bin Zakie) and not by use of his own passport D which was with him.

(h) Upon his arrest, the respondent led the police to recover a sum of RM7,000 in cash from the hotel room occupied by the respondent and he admitted that the said sum were the proceeds of the sale by him of E some gold jewellery.

(i) When queried by the 'pawnshop's owner's assistant who had purchased the jewellery from the respondent, the respondent had replied that the jewellery belonged to his 'girlfriend'.

F **[11]** As can be gleaned from the grounds of judgment issued at the close of the prosecution case by the learned trial judge, the principal grounds upon which the court acquitted and discharged the respondent at that stage were the following:

(a) The police had failed to retrieve the weapon which had caused the death of the deceased. The doctor who conducted the post-mortem was of the G view that the weapon used to inflict injuries on the deceased was a long sharp tapering object; the shards of glass splinter found in the room could not have been used in the stabbing of the deceased.

(b) SP9 was an unreliable witness. The court was sceptical of his evidence, particularly of having seen a tray of jewellery which allegedly had been H shown to him by the deceased.

(c) Although the autopsy report indicated that the deceased put up a struggle and had died a violent death (many injuries), yet there was no evidence from other occupants of the house or even neighbours that they had I heard any commotion or shouting.

(d) With respect to the jewellery, the learned trial judge said:

> There was also no evidence that the gold items sold by the accused belonged to the deceased. No one had made positive identification of the gold items sold. Further the accused had mentioned that the gold items belonged to his girlfriend whereas the deceased is his wife.

(e) There was a serious weakness in the prosecution case since two material witnesses namely, Maimunah (the deceased daughter) and the landlady of the premises, had not been called, although their names had been mentioned in the testimony of the prosecution witnesses. Their evidence, it was opined by the learned trial judge, was material in unfolding the narrative of the events upon which the prosecution case was based.

(f) The entire circumstantial evidence in this case was insufficient to irresistibly prove the guilt of the accused (the respondent).

Defence

[12] The respondent's defence, which was on oath as earlier noted, was essentially as follows:

(a) That the deceased was his wife and she was happy when he returned to the room (on 8 August 2012) after having been away for about two days.

(b) He had left for work on a Thursday morning.

(c) The deceased worked as a 'massage person' - and provided those services from the room they occupied.

(d) He used to stay often in a hotel close to his place of work due to his late working hours.

(e) He was unhappy with his wife for changing their wedding photo and had torn the same on 6 August 2012.

(f) He was arrested at a clinic on 13 August 2012. He had gone there to get a medical report and for an x-ray to be taken for purposes of renewing his 'passport' and to get a new 'visa'.

(g) Upon being cross-examined, the respondent admitted or testified as follows:

(i) that he had with him the sum of RM7,000 in cash when he was arrested.

(ii) the money was required to process the 'visa' permit and that he had asked his wife for permission to sell the gold to obtain cash and she had given her permission.

(iii) he was at home (the room) with the deceased on 8 August 2012 and up to the morning of 9 August 2012 and the last time he saw his wife was on the morning of 9 August 2012.

(iv) his DNA found in the blood stains found on the deceased's clothing and on the torn photograph and TV rack in the room, might have got there from a cut to his hands when was trying to grab the picture frame.

(v) the UNHCR card in the name of 'Shakar' that he had used was obtained for him by the deceased (his wife) as both of them did not have visa/work permit; the picture on the card was a very old photograph of his.

(vi) the gold (jewellery) belonged to him although he had asked permission of the deceased to dispose of it to raise cash.

(h) Upon re-examination, the respondent further did not dispute:

(i) that he had used the UNHCR card when he registered into the hotel (at Bangi).

(ii) that he had a valid passport with him then but did not use it at the hotel because he did not have a (valid) visa/work permit.

Submissions Before Us

[13] The thrust of the submission of the learned Deputy Public Prosecutor before us was that there had been a lack of judicial appreciation by the learned trial judge of the totality of the evidence led before the court at the close of the trial and if the evidence had been evaluated properly it would have shown that the respondent's defence had failed to raise any reasonable doubt to the prosecution case. It was also argued that the testimony of the respondent on the other hand had fortified the prosecution case that the circumstantial evidence all pointed irresistibly to the guilt of the respondent as charged.

[14] It was pointed out to us that no defence of 'alibi' had been raised at the outset or during the prosecution case and the learned trial judge was therefore in error to now speculate that the respondent was not possibly the last person to be with the deceased, notwithstanding that it could not be ascertained when the deceased was actually killed (para. 13 of the grounds of judgment).

[15] It was also highlighted to us that the respondent's explanation that, the blood stains (through DNA testing) found on the deceased's clothing and fingernails and on the other articles in the room, could have come from the broken glass of the photo frame during apparently a quarrel between the deceased and the respondent on 6 August 2012, was never suggested or raised with any of the relevant witnesses during the prosecution case. Further, the learned trial judge had only superficially dealt with the whole of the DNA evidence that had been adduced by the prosecution to link the respondent to the death of the deceased.

[16] Further and more materially, it was contended that the learned trial judge had failed to take into consideration a major contradiction in the respondent's own assertions as to the ownership of the jewellery that had been sold by the respondent. At the prosecution stage of the trial, it had been established through SP3 (Mohd Khalid bin Hosnis), the owner of the 'pawnshop' and SP4 (Mohd Ali bin Hosnis), (SP3's assistant and brother), that the respondent had represented at the time of selling the gold jewellery to them that the jewellery belonged to the respondent's girlfriend (teman wanita).

[17] Subsequently in his defence under oath, the respondent had for the first time admitted that the jewellery belonged to his wife and he had sold the same to raise cash to process his visa permit. Even the learned trial judge at the close of the prosecution case (as noted above) was persuaded to release the respondent from the charge for reason that there was no proper identification of the ownership of the jewellery sold by the respondent and this was stated to be a major weakness of the prosecution case. However now in the defence case, the respondent had expressly admitted that the deceased owned the jewellery in question or that, in the least, it was in her possession such that he had to obtain the deceased's permission to sell it.

[18] It was also highlighted to us that the learned trial judge had also failed to give due consideration to the subsequent conduct of the respondent in checking-in himself into a hotel in Bangi, using a UNHCR card under a different identity altogether. The respondent had a valid passport with him but chose not to use it. It was submitted that such conduct was an attempt to escape from being traced and further, pointed irresistibly to the guilt of the respondent for the murder of the deceased.

[19] It was submitted by the learned Deputy Public Prosecutor that on the whole, the defence was a bare denial and an afterthought. The respondent's defence had not raised any reasonable doubt to the *prima facie* case established by the prosecution and affirmed by the Court of Appeal.

[20] For the respondent however, it was argued that the respondent's explanation in defence was not inherently improbable and therefore it had to be held that a reasonable doubt had been created. It was also contended that the learned trial judge was correct in dismissing the charges against the respondent as the actual date of death of the deceased was never established and the prosecution had failed to call or offer to the defence crucial witnesses namely the landlady, the deceased's daughter and one other, Imran, which was necessary to place the case against the respondent beyond any reasonable doubt.

[21] It was also urged upon us that the respondent had sufficiently explained why he had to use the UNHCR card to register into the hotel, namely that although he had a valid passport, his visa/work permit had expired.

A **Our Deliberation And Decision**

[22] We were of the view that there were merits in this appeal by the Public Prosecutor. It was manifestly clear to us that the learned trial judge had failed to fully address and weigh the totality of evidence that was before the court at the close of the trial. This could be discerned essentially in
B respect of three material aspects of the evidence that was before the court.

[23] Firstly, the learned trial judge in our assessment failed to appreciate and ignored the significance of the subsequent conduct of the respondent after he had left the rented room on 9 August 2012. The learned trial judge was
C rather dismissive of the fact established on evidence that instead of returning to the room rented by him together with the deceased (at Kelana Jaya), the respondent had checked into a hotel at Bangi, and that he had even attempted to camouflage or fake his real identity until his arrest on 13 August 2012.

[24] It was admitted by the respondent that he had a valid passport at that
D time but he had not used the same to register himself at the hotel; he had used a UNHCR (refugee card) in the name of some other (Shakar bin Zakie).

[25] The explanation advanced by the respondent for his aforesaid conduct was that although he had a valid passport, he did not possess a valid work permit. This was a shallow excuse since commonly only a valid
E identification document was necessary for registration as a guest at any hotel; the validity of the work permit was only a concern if he was picked up at a particular workplace without such permit. In fact the respondent only did not possess a valid work permit at that material time and this was confirmed in the suggestion made by counsel for respondent to SP5 (ASP Koh Jok Tian)
F under cross-examination.

[26] The respondent also attempted to justify his stay at the hotel in Bangi on the grounds that he worked late and his place of work was close to the hotel. It should be noted however that the respondent did not call any witness to corroborate this claim that he worked late and he was employed
G somewhere in Bangi. This was, in our assessment, a bare claim devoid of any truth.

[27] In our view, the respondent's proved intention to assume a different identity and deceive was more significant to have been considered than the respondent's seeming explanation as to why he did not use his passport.
H Surely this subsequent conduct was intended to throw the police of his scent, so to speak, when the deceased's body was eventually found and there would be a search for him. The significance of this attempt by the respondent to go by another name appeared to have been lost on the learned trial judge.

I **[28]** The respondent's subsequent conduct inextricably pointed towards his involvement in the death of the deceased, rather than his innocence to the charge faced. If the explanations now put forward in defence were genuine, then there was no reason to fake his identity. He was obviously trying to

avoid being tracked by the police, at least for some time. In our assessment, it could not also be ruled out that the respondent was attempting to 'buy some time' perhaps, before he exited the country.

[29] Raja Azlan J (as His Royal Highness then was) in *Chandrasekaran & Ors v. PP* [1970] 1 LNS 11; [1971] 1 MLJ 153, 160 (HC) observed that:

> The evidence of subsequent conduct is relevant under section 8 of the Evidence Ordinance and may properly be taken into account, after the prosecution has established the guilt of the accused, to reinforce the satisfaction of the court as to the proof of guilt made out by the prosecution case (see *Chandika Prasad v. Emperor* 126 IC 684).

[30] Secondly, it was easily deducible from the overall evidence at the close of the trial that there was a major shift in the respondent's version as to the ownership of the jewellery in the defence. The respondent had been arrested by SP5 and he had led the police to recover the sum of RM7,000 from the hotel room. The respondent admitted that this was the proceeds from the sale of the jewellery (or at least RM6,300 thereof).

[31] As earlier noted, the prosecution had adduced the evidence of SP3 and SP4 from the 'pawnshop' where the transaction in regard to the jewellery had taken place. The records show that SP4 in his testimony positively identified the respondent (Pakistani) as the person from whom the jewellery was bought. It was the testimony of SP4 as well that he had questioned the respondent on the ownership of the jewellery and the respondent had replied that it belonged to his 'girlfriend'. Our perusal of the notes of proceedings show that there was no cross-examination of either SP3 or SP4, meaning that part of their evidence was agreed to and was not denied or challenged by the respondent, that is, at the prosecution stage of the case.

[32] What unfolded during cross-examination of the respondent when defence was entered was a different twist of the story. The pertinent part of the respondent's testimony was as follows:

S: Do you have any explanation where did you get this cash money?

J: I need worth the money for the visa permit and therefore I ask my wife if I can sell the gold for cash and she got permission to me, so I sold the gold for cash and other to pay the rest of the money for my visa permit.

P/B: Mohon maaf YA, I ask my wife for permission.

J: Permission to allow me to send the gold. The gold was mine. I did not buy the gold for my wife, so I sold the gold for the cash and I have to.

Mkh: But he asks his wife to sell the gold or the gold was his?

J: Yes, I had advice from my wife but the gold was his.

S: Can you tell to the court when you ask for your late wife permission?

A J: When I had return from work I ask my wife regarding this matter.

S: When exact date or time?

J: On the 8th of August in the night when I have done from work.

S: Do you agree with me that on 8th August until the morning of
B 9th August 2012, you were at home with your late wife?

J: I agree.

S: When you left home in the morning of 9th August it was the last time you met your late wife?

C J: I agree.

[33] What in substance was being asserted by the respondent in defence now was that the jewellery belonged to his wife (the deceased) or in the least it was in her possession and he had sought permission from her to sell the same to raise cash.

D **[34]** The learned trial judge ought to have noted that, if the respondent was to be believed, he should have had at the earliest opportunity mentioned this situation to the investigation officer (I.O.). This claimed scenario was only now been adverted to in the defence. Apart from SP3 and SP4 not being challenged on their testimony, neither was any suggestion put to that effect
E to the IO (SP10 - ASP Mohd Razlan Abdul Razak) during cross-examination. The use of the 'girlfriend' excuse with SP4 was in itself clearly, in our assessment, an attempt to divert any attention from his wife (the deceased). Such a resort to the untruth was, in our view, highly indicative of respondent's culpability to the offence charged.

F **[35]** This contradictory stance of the respondent should not have escaped the attention of the learned trial judge. This was definitely an afterthought by the respondent to extricate himself from the strong case that had been made out against him by the prosecution. The respondent was obviously attempting to soften the impact of the prosecution case made out against him
G by putting up the so-called 'consent' of the deceased which he claimed he had, to seek some legitimacy for the sale by him of the deceased's jewellery.

[36] It was SP9's (Zamri's) testimony that the deceased had previously shown SP9 her jewellery. The records show that SP9 was only cross-examined superficially merely to elaborate further on his testimony, at
H the prosecution stage of the trial. It was not put to SP9 by the defence at all that there was no truth to such an incident as testified by SP9. The learned trial judge was nevertheless sceptical of that evidence of SP9 as expressed in the grounds issued at the close of the prosecution case. From the line of defence adopted by the respondent, namely that he had permission of the
I deceased to sell the jewellery, it was implicit that the respondent now conceded that the deceased, even if she did not buy it herself, had in her possession in the rented room those jewelleries that the respondent had sold.

[37] It must also be noted that the claim of the respondent that he had the consent of the deceased to dispose of the jewellery was never suggested to SP9 or even to the IO (SP10). If that claim was indeed true, it should have been suggested or raised during the prosecution stage. That was not done. The explanation now sought to be advanced by the respondent was a further afterthought merely to exculpate himself from the facts that had been established by the prosecution that the respondent had proceeded to dispose the deceased's jewellery immediately after he had disappeared from the rented room where he had been living with the deceased and where the deceased's body was discovered.

[38] Thirdly, and importantly as submitted by the learned Deputy Public Prosecutor, it was obvious from the grounds of judgment that the learned trial judge had failed to give sufficient consideration to the evidence that the respondent's DNA was detected in the blood stains found on the clothing worn by the deceased, from the fingernail scrapings of the deceased, as well as found on other articles from the room where the deceased body was found. This was the most relevant and crucial evidence that linked the respondent to the offence he was charged with.

[39] The respondent's attempt to explain away this proven fact purportedly to an incident on the night of 6 August 2012 where according to the respondent he had some disagreement with his wife (the deceased) and a glass-photo frame had been broken then, was also only put forward for the first time during the defence case. It was not raised or suggested to any of the relevant prosecution's witnesses. This was no doubt a material aspect of the defence case which the respondent wanted the court to believe. However, the fact of such an incident having occurred, namely where a glass photo frame had been previously broken in the room, was never stated in any statement by the respondent during police investigation, or alluded to by the defence even during the prosecution stage of the case. The IO (SP10) was cross-examined only as to the existence/recovery of shards of glass from the rented room but that those broken glasses did emanate from such an incident as claimed to have happened was never suggested at all.

[40] The respondent's attempt to exonerate himself by wanting the court now to believe that the source of the blood stains on the deceased's clothing was indeed from such broken glass of the photo frame and not arising from him being at the scene and being involved in inflicting the violent injuries suffered by the deceased was, similarly as with the issue of the ownership of the jewellery, clearly an afterthought. The learned trial judge ought to have rejected that explanation as lacking any credibility at all.

Conclusion

[41] In our assessment, the failure of the prosecution to call or make available Maimunah (the daughter of the deceased), or the landlady to the room or even Imran (the deceased's former husband), would not have made

any difference, in our assessment, to the overwhelming evidence that tilted irresistibly against the respondent as having caused the death of his wife (the deceased). There was no alibi raised by the respondent at the commencement of the trial (that he was elsewhere) and neither was there an iota of evidence produced by the defence (either in cross-examination or in the defence case) that any of the three had the motive to commit the murder of the deceased.

[42] The respondent by his own admission was with the deceased in the rented room until the morning of 9 August 2012. There was no evidence of any break-in into the room. The respondent had not returned to the room after 9 August 2012. When he was arrested, the respondent himself led the police to a hotel in Bangi where he had checked-in with a false identity. He had sold the jewellery that had been in the possession of the deceased. The respondents' DNA was detected in the blood stains found on the clothing worn by the deceased.

[43] The principles governing the acceptance of circumstantial evidence to convict an accused have been laid down in numerous cases including *Sunny Ang v. PP* [1965] 1 LNS 171; [1966] 2 MLJ 195; *Jayaraman Velayuthan & Ors v. PP* [1982] CLJ 464; [1982[CLJ (Rep) 130; [1982] 2 MLJ 306; *PP v. Magendran Mohan* [2005] 3 CLJ 592; *Chan Chwen Kong v. PP* [1962] 1 LNS 22; [1962] 1 MLJ 307; *Karam Singh v. PP* [1967] 1 LNS 65; [1967] 2 MLJ 25; *Chang Kim Siong v. PP* [1967] 1 LNS 18; [1968] 1 MLJ 36.

The principle gleaned from those authorities was that a conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime.

[44] Suffice it here to reproduce some guiding excerpts from the aforecited authorities, to support that position. In *Sunny Ang*'s case (where the deceased's body was never found) the Federal Court noted:

> ... The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example - was it accident?

Thomson CJ's comments in *Chan Chwen Kong* were in the following terms:

> ... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

In *Karam Singh*, HT Ong FJ stated:

> ... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ...

And in *Chang Kim Siong*, the Federal Court emphasised that:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

[45] We were also mindful that if a conviction was to be based on circumstantial evidence, motive behind the crime was a significant consideration as was laid down in *PP v. Hanif Basree Abdul Rahim* [2004] 3 CLJ 700; [2004] 3 MLJ 271:

> [66] It is not incumbent upon the prosecution to prove the motive for a crime. However if the crime is alleged to have been committed for a particular motive, as is the case here, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive. Where a case is based on circumstantial evidence the motive for committing that crime assumes greater importance. It is certainly an important strand of circumstantial evidence to impute the accused's guilt ...

[46] It was our finding that the prosecution had more than sufficiently established the respondent's underlying motive in causing the death of the deceased, namely to lay his hands on the jewellery that was in the possession if not, owned by the deceased. The violent injuries suffered by the deceased were evidence that the deceased had possibly resisted this. Further, the respondent had proceeded to immediately dispose of those jewelleries and obtain cash.

[47] For the reasons discussed and elaborated above, it was our conclusion that no reasonable doubt had been raised by the defence to the prosecution's case. The learned trial judge was wrong therefore in acquitting and discharging the respondent at the close of the trial. We therefore, found this to be a proper case for our curial intervention and accordingly we reversed the High Court's decision arrived at the close of the trial.